Is the Turkish Constitutional Complaint System on the Verge of a Crisis?

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Last week, the Turkish Constitutional Court (TCC) delivered two decisions on the constitutional complaints of two journalists – Mehmet Altan and Şahin Alpay.[1] Considering the conjuncture of Turkey, one could say that the TCC acted relatively brave in delivering these decisions, like it was the case in its earlier Erdem Gül and Can Dündar[2] decision.

Başak Çalı made an analysis about the case here on the Verfassungsblog. I will not repeat the facts because she accurately summarised the situation in Turkey. I would like to present briefly some of the related debates in the Turkish literature on this issue as well as some prospects for the future.

Originality of the Decisions

The TCC's decisions were remarkable as they diverge from the judgments of similar nature of the European Court of Human Rights (ECtHR) against Turkey on two points:

Firstly, the violations of freedom to liberty and security were found not focusing on the point of long duration of pre-trial detention, but focusing on "strong suspicion" determination concerning the first decision ordering detention on remand of the first instance assize courts. That is to say in terms of the ECHR, the violations were found in relation to Article 5 § 1 (c) of the Convention (reasonable suspicion), not Article 5 § 3. Such a consideration by the ECtHR is not very common in Strasbourg case-law regarding the judgments against Turkey.[3]

Secondly, the TCC made its "strong suspicion" determination in relation to the ongoing case, unlike Strasbourg's similar decisions, which were given after the release of the applicants.[4]

Due to these reasons, the first instance courts are not used to such interference from other judiciary branches in the ongoing cases. Nevertheless, the TCC's progressive decisions were welcomed by a number of politicians and academics. However, the TCC was criticized by some, including government officials, with the claim that the TCC had overridden its authority by making an assessment about the "strong suspicion" determination of the first instance court in the ongoing case and by acting as a "super-appeal court" (Super-Revisionsgericht). The Courts of Assize, most likely encouraged with such discourses, declared the decision of the TCC as "null" which is applied in cases of "usurpation of competence" in the Turkish public law.

Thus, what was experienced in Turkey was at first sight an issue of competence conflict between the constitutional jurisdiction and the specialized jurisdiction (Kompetenzkonflikt zwischen Verfassungsgerichtsbarkeit und Fachgerichtsbarkeit). As former ECtHR judge Lech Garlicki said, such a conflict is always possible in centralized Kelsenian system of

judicial review since constitutional courts and specialized courts are following the same path, but not necessarily the same rules and in the same direction.[5] However, as regards to the right to liberty and security, the rules applicable to the case overlap frequently and even compulsorily. This arises from the nature of the right to liberty. According to Article 19 of the Constitution: “Individuals against whom there is strong evidence of having committed an offence may be arrested by decision of a judge (…)”, and Article 100 of the Criminal Procedure Code stipulates that “in the event that there are facts which tend to present the existence of a strong suspicion of a crime (…) a detention on remand against the suspect or accused may be ordered.”

The criteria followed by the criminal courts and the TCC obviously coincide with each other when it comes to the assessment of strong evidence/strong suspicion for detention.

Moreover, since the Constitution refers directly back to statute and, consequently, under Article 19 failure to comply with statute entails a violation of the Constitution, the TCC claims to exercise a certain power of review of whether statute has been complied with or not. Hence, it is not easy to say that there is usurpation of competence for the TCC. Nevertheless, the Courts of Assize have a different opinion. According to them, the TCC’s decision exceeding constitutional limits is null and not binding. At this stage, the following question becomes critical: Do the Courts of Assize have such an authority?

Interestingly, the answer to the question is not clear in the Turkish literature. In the Turkish doctrine, the scope of binding effect of the TCC’s decisions is controversial. Likewise, whether any court or authority can declare the TCC’s decision as null or not was also discussed in the Turkish literature in the past.

The Old Debate on the Binding Effect of the TCC’s Decisions

According to Article 153 of the Constitution, “Decisions of the Constitutional Court shall be published immediately in the Official Gazette, and shall be binding on the legislative, executive, and judicial organs, on the administrative authorities, and on persons and corporate bodies.”

The Article is explicit at first sight. Yet, the Turkish doctrine makes a distinction between res judicata, force of law and binding effect within the scope of the Article. And there is the complex question on which parts of the decision the binding effect applies. Some of the scholars defended that the TCC -as a guardian of the Constitution- is the authoritative and the only interpreter of the Constitution and therefore the binding effect must also cover the ground of their decisions.[6] On the other hand, other scholars -including the President and a judge of the TCC- were arguing that the ground of the Court’s decision is not binding, but only a part of the final order.[7] (The debate, besides being a technical law discussion, also contained political tension since the TCC brought the ban on the headscarf in universities in the reasoning of their Headscarf-II decision.[8])

Judiciary bodies also have different opinions on this issue. For the TCC, the reasoning of their decisions is binding for other courts, whereas for the Council of State, it is not the reasoning but the final order which is of binding nature.

Today, the debate is revived within the context of a constitutional complaint. In my opinion, the final order and the grounds of the decision are inseparable in this case as the TCC holds that “a copy of the decision to be sent to the Assize Court in order to eliminate the consequence of the violation” on the part of the final order.

The Old Debate over the “Nullity” of the TCC’s Decisions

The debate on the nullity of the TCC’s decision is not a new topic for Turkey. Nullity became the main topic during the 2007-2008 unconstitutional constitutional amendment process. The TCC annulled amendments to the Constitution concerning the principle of equality and the right to education, which had been enacted by the parliament in order to abolish the headscarf ban in universities. In an important and controversial decision (Headscarf-III decision[9]), the TCC ruled that the amendments were unconstitutional as they infringed on the constitutional provision mandating a laic state.[10]

The decision of the TCC had led to a constitutional crisis in Turkey. Some of the scholars, including an old TCC rapporteur-judge and a prominent public law professor[11], suggested that the TCC’s decision involved “functional usurpation” which lead to nullity of the decision, therefore, each court in Turkey had the authority to declare nullity of the decision. But at that time, no such decision was given by a court. Today, the debate is revived within the context of constitutional complaint. In my opinion, the TCC’s decision is consistent with their former case-law and the case-law of Strasbourg. The reaction of the Court of Assize is extreme.

Is this the first non-execution of the TCC’s Decision?

It is not the first time that a decision given by the TCC is not executed in Turkey. The Selman Kerimoğlu and others decision which was not executed as required can be given as an example.[12] In that case, the applicant’s relative who had been transferred to an insecure hotel by public authorities after the Van earthquake consequently died during the aftershocks. The TCC found a violation of the right to life since the competent authorities had not allowed investigation for the responsible officials. The applicants made a new constitutional complaint to the TCC and the case is still pending. There are other decisions which are alleged to be non-executed. Nevertheless, it is the first time that a TCC decision related to the right to liberty and security was not executed

Possibilities for the Future

So what could be next for the journalists? There are at least four possibilities:

The first possibility is that the Courts of Assize can issue an order for the release of journalists in the near future which would mean that the constitutional crisis would end without deepening further.

The second possibility is that either the TCC or the ECtHR may rule for a new violation decision. In this case, the decision, especially from the ECtHR’s side, would probably encompass not only the violation of the right to liberty and security, but also the right to a

fair trial due to the fact the execution of the TCC decision has been refused by the first instance courts. Moreover, the TCC might also take necessary actions for release, in other words, the TCC may exercise its authority to order directives of how the judgments should be executed, as prescribed by Article 50 § 1 of the Code on Establishment and Rules of Procedures of the Constitutional Court. This is also possible for the ECtHR.[13]

The third possibility is that the Courts of Assize might issue a final judgment in the near future. If the court issues an order for conviction, the Şahin Alpay and Mehmet Altan cases would no longer be discussed within the context of the right to liberty and security (Art. 5 § 1 [c] or 5 § 3). Since the Court of Assize would pronounce guilt, impose a sentence of imprisonment and order continuing detention pending disposal of the appeal, then the ECtHR or the TCC would probably consider that the detention does not fall within the right to liberty.[14] Thus, after the judgment, the violations of the right to a fair trial or the principle of legality of crimes and punishments or the freedom of expression can be brought before the TCC only after the exhaustion of domestic remedies. In such a circumstance, the TCC and/or the ECtHR having regard to the particular circumstances of the case and the urgent need to put an end to the violations of freedom of expression, might hold that as one of the means to discharge obligation, competent authority shall secure the applicant's immediate release.[15]

The fourth possibility is that the Courts of Assize might issue a final judgment in the near future, but both the TCC and ECtHR can still consider the judgment through the lens of the right to liberty and security (Art. 5 § 1 [a]) and find that the applicants' conviction had been the result of a "flagrant denial of justice", since they had not had a fair trial before the assize court.[16] However, the execution of the new possible decision by the first instance courts is still ambiguous.

It should be noted that there is also a sword of politics swaying over all of these possibilities. But in any case, a constitutional crisis seems to be deepening in the short term. Nevertheless, Turkey and the TCC also have enough experience to overcome this crisis, albeit in the long term.

[1] Şahin Alpay, TCC, no. 2016/16092, 11/01/2018; Mehmet Hasan Altan, TCC, no. 2016/23672, 11/01/2018.

[2] Erdem Gül and Can Dündar, TCC, 2015/18567, 25/02/2016.

[3] In the cases of many journalists, the ECtHR found a violation of Article 5 § 3. See. Şık v. Turkey, ECtHR, no. 53413/11, 08/07/2014 and in Nedim Şener v. Turkey, ECtHR, no. 38270/11, 08/07/2014.

[4] See. Tuncer and Durmuş, ECtHR, no. 30494/96, 02/11/2004; İpek and others v. Turkey, ECtHR, no. 17019/02 30070/02, 03/02/2009; Ayşe Yüksel and others v. Turkey, ECtHR, 55835/09 55836/09 55839/09, 31/05/2016; Mergen and others v. Turkey, ECtHR, nos. 44062/09 55832/09 55834/09 55841/09 55844/09, 31/05/2016.

[5] Lech Garlicki, “Constitutional Court vs Supreme Court”, International Journal of Constitutional Law, Volume 5, Issue 1, 2007, pp. 44–68.

[6] See Bülent Tanör/Necmi Yüzbaşıoğlu, 1982 Anayasasına Göre Türk Anayasa Hukuku, (İstanbul: Beta, 2013), p. 553; Erdoğan Teziç, “Türkiye’de Siyasal Düşünce ve Örgütlenme Özgürlüğü”, Anayasa Yargısı, C. 7, 1990, p. 46; Fazıl Sağlam, “Yetki ve İşlev Bağlamında Anayasa Mahkemesi’nin Yasama, Yürütme ve Yargı ile İlişkisi”, Anayasa Yargısı, C. 13, 1996, p. 58; İbrahim Ö. Kaboğlu, Anayasa Yargısı, (İstanbul: Legal, 2000), p. 151; Turan Yıldırım, “AYM Kararlarının Bağlayıcılığı”, Amme İdaresi Dergisi, C. 26, 1993, p. 74; Yılmaz Aliefendioğlu, Anayasa Yargısı ve Türk Anayasa Mahkemesi, (Ankara: Yetkin, 1996), p. 294; Zafer Gören, Anayasa Hukuku, (Ankara: Seçkin, 2000), p. 305.

[7] See Ayhan Döner, “Anayasa Mahkemesi Kararlarının Gerekçelerinin Bağlayıcılığına İlişkin Bazı Sorunlar”, Prof. Dr. Ergun Özbudun’a Armağan, (Ankara: Yetkin, 2008), p. 215; Ergun Özbudun, Türk Anayasa Hukuku, (Ankara: Yetkin, 2017), p. 422; Kemal Gözler, Türk Anayasa Hukuku, (Bursa: Ekin, 2000), p. 926; Yusuf Şevki Hakyemez, “Anayasa Mahkemesi Karar Gerekçelerinin Bağlayıcılığı Sorunu”, Ergun Özbudun’a Armağan, (Ankara: Yetkin, 2008), p. 382; Zühtü Arslan, “Anayasa Mahkemesinin Yorum Tekeli Yargısal Üstünlük ve Demokrasi”, Prof. Dr. Ergun Özbudun’a Armağan, (Ankara: Yetkin, 2008), pp 59-88.

[8] AYM, E. 1990/36, K. 1991/8, T. 09/04/1991.

[9] AYM, E. 2008/16, K. 2008/116, T. 05/06/2008.

[10] See Yaniv Roznai/Serkan Yolcu, “An Unconstitutional Constitutional Amendment—The Turkish Perspective: A Comment on the Turkish Constitutional Court’s Headscarf Decision”, International Journal of Constitutional Law, Volume 10, Issue 1, 2012, pp. 175–207. See also Kemal Gözler, Juridical Review of Constitutional Amendments: A Comparative Study, (Bursa: Ekin, 2008), pp. 47 and 95.

[11] See. Ali Acar, “Tension in the Turkish Constitutional Democracy: Legal Theory, Constitutional Review and Democracy”, Ankara Law Review, Vol. 6, No. 2, pp. 141-173.

[12] Selman Kerimoğlu and others, TCC, 2012/752, 17/09/2013.

[13] See Assanidze v. Georgia, ECtHR, 71503/01, 08/04/2004, § 14; Ilaşçu and others v. Moldova and Russia, ECtHR, no. 48787/99, 08/07/2004, § 22.

[14] See Wemhoff v. Germany, ECtHR, no. 2122/64, 27/06/1968, § 9.

[15] Fatullayev v. Azerbaijan, ECtHR, no. 40984/07, 22/04, 2010, § 177.

[16] See. Ilaşcu and others v. Moldova and Russia, § 461; Stoichkov v. Bulgaria, ECtHR, no. 9808/02, 24/03/2005, § 58; Guemeniuc v. Moldova, ECtHR, no. 48829/06, 16/05/2017, § 25.

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